SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 21 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 10

WHYY, INC.,

Appellant,

v.

BOROUGH OF GLASSBORO

and

DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey.

BRIEF FOR APPELLEE, BOROUGH OF GLASSBORO.

JOHN W. TRIMBLE,
Attorney for Appellee, Borough of Glassboro,
8 Tanner Street,
Haddonfield, New Jersey,

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

	PAGE
Questions Presented	1
Statement of Facts	2
Summary of Argument	2
Argument	3
I. This Court should not accept an appeal based on an infringement of a constitutional right unless it was seasonably raised	3
II. The State of New Jersey has a right to require certain requisites of a corporation before it declares it exempt from taxes	5
Conclusion	7

TABLE OF CITATIONS

CASES:

Baltic Min. Co. v. Massachusetts, 231 U. S. 68 (1913)	6
Ducat v. Chicago, 10 Wall. 410 (1871)	6
Lettieu v. State Board of Medical Examiners, 24 N. J. 199, 206 A. 2d 518 (1957)	4
Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. 566 (1870)	6
Louisville, etc. R. Co. v. Smith, 204 U. S. 551 (1906)	5
Paul v. Virginia, 8 Wall. 168 (1869)	6
Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181 (1888)	6

PAGE

Radio Station WOW v. Johnson, 326 U. S. 120 (1945) 4

Railroad Express Agency, Inc. v. Commonwealth of Virginia, 282 U. S. 440 (1931) 7

Spies v. Illinois, 123 U. S. 131 (1887) 4

Thomas v. Iowa, 209 U. S. 258 (1907) 5

Western U. Teleg. Co. v. Frear, 241 U. S. 329 (1914) 6

Wheeling Steel Corp. v. Glander, 337 U. S. 562 (1949) 5, 7

STATUTE:

New Jersey Statutes Annotated 54.4-3.6 3

QUESTIONS PRESENTED.

I. Whether the Supreme Court of the United States should hear an appeal where the Federal Question was initially raised before the New Jersey Supreme Court.

II. Whether the Supreme Court of New Jersey has denied appellant equal protection of the laws by requiring it to incorporate in New Jersey to receive a tax exemption.

STATEMENT OF FACTS.

In addition to the facts set forth in the Appellant's brief, the Borough of Glassboro would like to add the following:

The Borough presently has 20% of its total land area exempt from taxes due to functions of the State of New Jersey presently located within its boundaries. The tax rate on the remaining properties is the highest in Gloucester County. The appellant never filed a form for exemption with the tax assessor as required by New Jersey law.

SUMMARY OF ARGUMENT.

The appellant never raised the federal issue until it attempted to be heard in the New Jersey Supreme Court. The New Jersey Supreme Court recognized this but felt the issue was of public importance and heard the appellant notwithstanding there was no grounds for appeal. This Court has uniformly denied an appeal if the appellant did not raise the federal question at the earliest possible moment in the litigation. This appellant argued the statutory construction of the state statute until it reached the New Jersey Supreme Court when the federal issue first appeared.

New Jersey has a right to require one seeking an exemption to taxes, when the physical assets are located in New Jersey, to become domesticated. Only in that way could New Jersey be sure the exemption is being uniformly granted; other jurisdictions might have more lenient grounds for granting an exemption which wouldn't apply in New Jersey, thereby placing the burden of examining the exempt criteria of a foreign jurisdiction on the local tax assessor.

ARGUMENT.

I. This Court should not accept an appeal based on an infringement of a constitutional right unless it was seasonably raised.

After the exemption was denied by the Borough, the appellant appealed to the Gloucester County Board of Taxation, an administrative body (Appellant's Appendix "C" pages A-19-22). The appellant did not raise any constitutional right but simply claimed a tax exemption as a non-profit and educational institution.

Following an adverse decision the appellant appealed to the New Jersey Division of Tax Appeals. Once again the appellant failed to raise any constitutional right (Appellant's Appendix "C" pages A-24-30). This appeal was heard before Anthony H. Lario, President of the Division of Tax Appeals and is heard as a trial de novo. The opinion of the Court is set forth in appellant's appendix "C" pages A-33-37. The sole argument of the appellant was in the statutory construction of N. J. S. A. 54:4-3.6.

Following an adverse decision the appellant filed an appeal with the Appellate Division of the Superior Court. Once again, the appellant failed to raise any constitutional argument. The two questions presented by the appellant in his Appellate Division Brief were:

1. "Is a non-profit corporation organized to provide cultural recreational, and educational radio and television broadcasts, entitled to a tax exemption on its real property in the State of New Jersey."

2. "Is a foreign, non-profit corporation, organized under the laws of the State of New Jersey, entitled to a tax exemption."

The only mention of a constitutional issue is found on page 6 of the Appellant's Brief where it is argued:

> "In light of the above requirements, it is our position that the petitioner is fully subject to legal process under the laws of the State of New Jersey, as if it were originally incorporated in the State of New Jersey, and is, therefore, equally entitled to any exemption under the constitutional provision of equal protection."

The Borough moved to dismiss the appellant's appeal to the New Jersey Supreme Court for failure to raise a constitutional issue prior to that time. (The Appellate Division's decision was unanimous thereby leaving the appellant without a ground for appeal. New Jersey Supreme Court Rules require a constitutional issue be raised if the appellate court is unanimous.) The New Jersey Supreme Court said:

> "This Court may but need not accept a constitutional question not raised below. *Lettieu v. State Board of Medical Examiners*, 24 N. J. 199, 206, 131 A. 2d 518 (1957). As this constitutional contention is one of great concern to many municipalities and non-profit foreign corporations, the public interest in this question demands that it be decided" (App. 1, p. 20).

It is clear that the New Jersey Supreme Court agreed with the Borough's contention that a constitutional issue had not been raised prior to the appeal to that Court. However, the Court felt the problem of such public concern to waive the rule.

This Court has repeatedly denied appeals which did not seasonably raise the Federal question. *Spies v. Illinois*, 8 S. Ct. 21, 123 U. S. 131, 31 L. Ed. 80 (1887); *Radio Station WOW v. Johnson*, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092 (1945).

As was stated by this Court in *Thomas v. Iowa,* 28 S. Ct. 487, 209 U. S. 258, 52 L. Ed. 782 (1907):

> "A mere claim in the Court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinction to give us jurisdiction to consider whether that has been a violation of the Fourteenth Amendment of the Constitution."

And in *Louisville, etc. R. Co. v. Smith,* 27 S. Ct. 401, 204 U. S. 551, 51 L. Ed. 612 (1906), this Court said:

> "If a party relies upon a federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement."

It is clear that the appellant first raised the Federal question when it appealed to the New Jeresey Supreme Court. This is not in compliance with the prior stated Federal cases, and therefore, not seasonably raised.

II. The State of New Jersey has a right to require certain requisites of a corporation before it declares it exempt from taxes.

WHYY, Inc. relies on the case of *Wheeling Steel Corp. v. Glander,* 337 U. S. 562 (1949). The rule in that case is not apposite to the case at bar. The *Wheeling* case dealt with corporations for profit which were maintaining businesses in the State of Ohio. That case deals with the ability of a state to tax a foreign profit corporation on its personal property (much of which were intangibles).

The case at bar deals with a state granting an exemption from taxes. New Jersey allows such an exemption only if a corporation is both non-profit and incorporated in New

Jersey. The right, in general, of a state to make discriminations in matters of taxes and license fees, in favor of domestic and against foreign corporations, or at least to make separate classifications for this purpose, a condition of admission for foreign corporations to do business in the state is supported by many authorities. *Paul v. Virginia* (1869), 8 Wall. 168, 19 L. Ed. 357; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts* (1870), 10 Wall. 566, 19 L. Ed. 1029; *Ducat v. Chicago* (1871), 10 Wall. 410, 19 L. Ed. 972; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania* (1888), 125 U. S. 181, 31 L. Ed. 650, 8 Sup. Ct. Rep. 737; *Baltic Min. Co. v. Massachusetts* (1913), 231 U. S. 68, 58 L. Ed. 127, 34 Sup. Ct. Rep. 15, affirming (1911), 207 Mass. 381, 93 N. E. 831 and 212 Mass. 35, 98 N. E. 1056; *Western U. Teleg. Co. v. Frear* (1914), 216 Fed. 199, affirmed in (1916), 214 U. S. 329, 60 L. Ed. 1027, 36 Sup. Ct. Rep. 563.

The case at bar deals with an exemption or the complete absence of taxes. A fortiori, a state should be able to discriminate or at least set forth the criteria under which a foreign corporation is entitled to a "free ride" while doing business in New Jersey. This exemption takes on added significance under the factual situation since Glassboro already has 20% of its land area tax free and consequently sustains the highest tax rate in the county.

The New Jersey Supreme Court recognized the problems which might arise if foreign non-profit corporations were to establish New Jersey as their home base when it stated at page 21 in appellant's Appendix 1:

> "The corporation laws of sister states may be less exacting than New Jersey with respect to what organizations qualify as non-profit corporations because the state of incorporation deemed them to be non-profit in nature, it may well be that exemptions would thereby be granted to corporations which, if formed here, would not have a tax exempt status. The legis-

lature could validly decide that the State should not be burdened with the administrative problem of checking the status of foreign corporations under foreign laws and evaluating them with our requirements".

It should be noted that the case at bar differs from the rule set forth in the *Wheeling Steel* case inasmuch as it is not the State of New Jersey that is taxing the Appellant, but the Borough of Glassboro which is maintaining municipal services for the Appellant. The Borough of Glassboro, under the tax structure in New Jersey, must raise its own funds from local real estate and personal property taxes to pay for the cost of its municipal services which the Appellant is demanding for free.

The requirement that a foreign corporation become domesticated in order to do business is not a novel idea. This Court held in *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450 (1931), that such a requirement was valid even though the plaintiff argued that it would lose its diversity status and thereby the use of the Federal Courts.

It is submitted that the decision of the New Jersey Supreme Court should be affirmed.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

JOHN W. TRIMBLE,
Attorney for Appellee, Borough of Glassboro.